Supreme Court, U.S.
FILED
JAN 10 1983
ALEXANDER L. STEVAS
CLERK

No. 82-372

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, ET AL.,
Petitioners

v.

GROLIER INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

REX E. LEE
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2217

Daniel
~~DAVID~~ S. MASON
FURTH, FAHRNER, BLUEMLE
& MASON
Furth Building, Suite 1000
201 Sansome Street
San Francisco, CA 94104
(415) 433-2070

PETITION FOR CERTIORARI FILED SEPTEMBER 2, 1982.
PETITION FOR CERTIORARI GRANTED NOVEMBER 8, 1982.

TABLE OF CONTENTS

	Page
Court of Appeals Docket Sheet	1
District Court Docket Sheet	6
Complaint, Including Exhibits A-D	9
Answer	24
Defendants' Motion For Dismissal Or, In the Alternative, For Summary Judgment	26
Documents Accompanying Defendants' Motion For Dismissal:	
Defendants Statement of Material Facts	28
Affidavit of Kent C. Howerton	31
Index to Documents (in part)	34
Exhibit A to Plaintiffs' Statement of Points and Authorities In Opposition To Defendants' Motion For Dismissal	38
District Court Memorandum Opinion of February 21, 1980	46
District Court Judgment and Order of February 21, 1980)	51
Order Allowing Certiorari	52

GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1939

DATE	FILINGS—PROCEEDINGS
(E) 08-11-80	Copy of notice of appeal and docket entries from Clerk, District Court (n-2)
(E) 08-11-80	Docketing fee was paid in District Court on 08-07-80
(C) 08-22-80	Certified Original Record (1 vol.) (n-3)
(T) 09-24-80	4-Appellant's motion for leave to file motion to extend time to file brief (m-24)
(B) 10-02-80	Order per CJ Wright granting appellant's motion for leave to file motion to extend time to file brief
(B) 10-02-80	4-Appellant's motion to extend time to file brief 12-1-80 (m-24)—GRANTED
(T) 11-25-80	4-Appellant's motion for leave to file motion to extend time to file brief (m-25)
(T) 12-05-80	Clerk's order granting appellant's motion for leave to file motion to extend time to file brief to and including January 5, 1981
(T) 12-05-80	4-Appellant's motion to extend time to file brief —granted
(D) 1-5-81	4-Appellant's motion for leave to proceed under Rule 30(c), deferred appendix (m-5)
(D) 1-5-81	4-Appellant's brief (m-5)
(T) 01-13-81	Clerk's order granting the parties leave to proceed under Rule 30(c)
(T) 01-27-81	4-Appellees' motion to extend time to file brief to March 11, 1981 (m-27)

DATE	FILINGS—PROCEEDINGS

(C) 02-06-81 Clerk's order granting appellees' motion to extend time to file brief to 3/11/81

(C) 03-09-81 4-Appellees' motion for leave to file motion to extend time to file brief (m-9)

(B) 03-12-81 Clerk's order granting appellee's motion for leave to file motion to extend time to file brief

(B) 03-12-81 4-Appellee's motion to extend time to file brief to 4-1-81 (m-9)—GRANTED

(T) 03-30-81 4-Appellees' motion for leave to file motion to extend time to file brief (m-30)

(B) 04-03-81 Clerk's order granting appellees' motion for leave to file motion to extend time to file brief to 4-10-81

(B) 04-03-81 4-Appellees' motion to extend time to file brief to 4-10-81—GRANTED

(T) 04-10-81 3-Appellees' brief (m-10)

(T) 04-20-81 4-Appellant's motion to extend time to file reply brief to May 27, 1981 (m-20)

(B) 05-01-81 Clerk's order that the time for filing appellant's reply brief is extended to and including May 27, 1981. The appendix of the parties shall be filed 7 days after appellant's reply brief and the printed briefs of the parties shall be filed 14 days thereafter.

(T) 05-01-81 7-Joint Appendix (p-1)

(V) 05-27-81 15-Appellant's opening brief (m-26)

(V) 05-27-81 15-Appellant's reply brief (m-26)

(V) 06-03-81 15-Appellees' brief (m-3)

(B) 07-23-81 Clerk's order, sua sponte, that the following times are allotted for the oral argument of this case: Appellant—20 minutes; Appellees—20 minutes.

DATE	FILINGS—PROCEEDINGS

(B) 09-29-81 Argued before Wright, MacKinnon * and Wald, CJ's. On motion of Mr. Meiser, Mr. Mason, a member of the bar of the Supreme Court of California was allowed to argue pro hac vice for appellant.

(S) 02-04-81 Opinion per curiam

(S) 02-04-82 Opinion dissenting in part and concurring in part filed by Circuit Judge MacKinnon

(S) 02-04-82 Judgment that the judgment of the District Court is affirmed in part, vacated in part, and the case is remanded, in accordance with the opinion

(C) 02-19-82 4-Appellants' bill of costs (m-18)

(S) 02-25-82 Per Curiam order that the opinion for the Court filed on February 5, 1982 in this case is amended; see order for details

(V) 03-22-82 15-Appellees' petition for rehearing and suggestion for rehearing en banc (m-22)

(V) 03-26-82 1-Letter from counsel for appellant advising of change of firm name & address (m-2)

(V) 04-07-82 Per Curiam order that appellee's petition for rehearing filed March 22, 1982 is denied; Wright, MacKinnon and Wald, CJs. (Circuit Judge MacKinnon would grant the petition for rehearing.

(V) 04-07-82 Per Curiam order, en banc, that appellees' suggestion for rehearing en banc is denied; CJ Robinson, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva (who did not participate), Edwards, Ginsburg and Bork (who did not participate), CJs. (Circuit Judges Tamm, MacKinnon, Robb and Ginsburg would grant the suggestion for rehearing en banc)

(B) 04-09-82 Per Curiam order, sua sponte, that the panel order of April 7, 1982, is amended by making the attached statement a part thereof; Wright and Wald, CJ's (See order for attached "Statement of Circuit Judges Wright and Wald on Petition for Rehearing").

DATE	FILINGS—PROCEEDINGS

(G) 04-14-82 4-Appellees' motion to stay issuance of mandate (m-14)

(C) 05-17-82 4-Appellees' (Fed.) motion to stay issuance of mandate (m-17)

(V) 05-27-82 Per Curiam order that appellees' motions to stay issuance of the mandate are partially granted and the Clerk is directed not to issue the mandate herein for a period of 30 days from the date of this order; Wright, MacKinnon and Wald, CJs (Judge MacKinnon would grant a stay of mandate for a period of 60 days from the date of this order)

(B) 05-27-82 4-Appellant's opposition to motion to stay issuance of mandate (m-24)

(C) 06-09-82 Letter from counsel for appellant advising that appellant's opposition to motion to stay was mailed on May 24, 1982

(B) 06-25-82 4-Appellees' (federal) motion to stay issuance of mandate (m-24)

(C) 06-30-82 4-Appellant's opposition to appellees' motion to stay issuance of mandate (m-28)

(C) 07-01-82 4-Appellees' reply to opposition to motion to stay mandate (m-1)

(C) 07-23-82 4-Appellees' (Fed) motion to stay issuance of mandate (m-23)

(V) 07-27-82 Per Curiam order that appellees' motion to stay issuance of mandate is granted and the Clerk is directed not to issue the mandate herein for a period of 30 days from the date of this order; Wright, MacKinnon and Wald, CJs

(C) 08-05-82 Copy of letter from Clerk, SC extending time to file petition for writ of certiorari to 9/4/82 in SC No. A-1122 on August 3, 1982

(B) 08-26-82 4-Appellees' (fed.) motion to stay issuance of mandate (m-26)

DATE	FILINGS—PROCEEDINGS

(B) 09-08-82 Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed on 09-02-82 in SC No. 82-372

(V) 09-23-82 Per Curiam order that appellees' motions to stay issuance of mandate are granted and the Clerk is directed not to issue the mandate herein pending final disposition of this case by the Supreme Court; Wright, MacKinnon and Wald, CJs

(T) 11-09-82 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-372 on 11-08-82

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 79-1215

Date	Proceedings
1979	
May 3	COMPLAINT: Exhibits A thru D; appearance.
May 3	SUMMONS (7) and copies (7) of complaint issued. U.S. Atty ser 5-4-79 Defts. ser 5-9-79
June 5	ANSWER by deft. to complaint.
June 5	CALENDARED. CAL/N.
Jul 9	STATUS CALL. Motion of deft. for summary judgment and indexing by 8-20-79; pltff. given until 9-10-79 for reply; parties to indicate on the pleadings if they wish an oral hearing. (Rep. Dennis Bossard) Flannery, J.
Jul 11	ORDER filed July 10, 1979 directing that defts. file a Vaughn index and motion for summary judgment by 8-20-79; pltff. file cross-motion for summary judgment or other appropriate response by 9-10-79. (N) Flannery, J.
Aug 17	MOTION by defts. for enlargement of time to file its dispositive motion.
Aug 22	ORDER filed Aug. 21, 1979 directing that deft. will have until 9-17-79 to file their dispositive motion; pltff. will have until 10-8-79 to file opposition. (N) Flannery, J.
Sept 14	MOTION (second) of defts. for enlargement of time within which to file a dispositive motion.
Sept 20	ORDER filed Sept. 19, 1979 extending defts. time to and including 10-5-79 to file dispositive motion and pltff. will have to and including 10-26-79 to file any opposition. (signed 9-18-79) (N) Gasch, J.
Oct 5	THIRD MOTION by defts. for enlargement of time to file dispositive motion.

Date	Proceedings
1979	
Oct 10	MOTION by defts. for dismissal or, in the alternative, for summary judgment; statement; P&A; affidavits (12); index to documents; attachments (4). "Let this be filed." (FIAT) Flannery, J.
Oct 11	ORDER filed Oct. 10, 1979 that defts. will have until Oct. 9, 1979 within which to file their dispositive motion. (signed 10-9-79) (N) Flannery, J.
Oct 22	MOTION by pltff. for extension of time to respond to defts. motion for dismissal or, in the alternative, for summary judgment.
Oct 24	ORDER filed Oct. 23, 1979 granting extension of time to 11-2-79 for pltff. to respond to defts. motion for dismissal or, in the alternative, for summary judgment. (N) Flannery, J.
Oct 30	AMENDED motion by pltff. for extension of time to respond to defts. motion for dismissal or, in the alternative, for summary judgment.
Nov 6	ORDER filed Nov. 2, 1979 extending time until 11-9-79 for pltff. to respond to defts. motion for dismissal or, in the alternative for summary judgment. (N) Flannery, J.
Nov 9	THIRD motion by pltff. for extension of time to respond to defts. motion for dismissal or, in the alternative, for summary judgment.
Nov 14	ORDER FILED Nov. 13, 1979 extending time until 11-16-79 for pltff. to respond to defts. motion for dismissal or, in the alternative, for summary judgment. (N) Flannery, J.
Nov 15	CROSS-MOTION by pltff. for partial summary judgment and opposition to motion of defts. for dismissal or, in the alternative, for summary judgment; statement; table of contents; table of cases; P&A; Exhibit A.

Date	Proceedings
1980	
Feb. 22	MEMORANDUM filed 2-21-80. (N) FLANNERY, J.
Feb. 22	JUDGMENT & ORDER filed 2-21-80 that judgment be entered on behalf of the defts. with respect to documents number 1, 2, and 4 and that the defts. submit documents number 3, 5, 6 and 7 for in camera review before 3-5-80. (N) FLANNERY, J.
May 20	MOTION of pltf. for production of documents; P & A; attachment.
Jun 13	MEMORANDUM (N) FLANNERY, J.
Jun 13	JUDGMENT entered on behalf of detfs [sic] with respect to documents numbered 3, 5, 6 & 7 dismissing this case. (N) (JS6 case closed) (Signed 6-12-80) FLANNERY, J.
Aug 7	NOTICE OF APPEAL of pltf for judgment entered on 2-21-80 and 6-13-80; $5.00 USDC fee and $65.00 USCA fee paid & credited to the U.S. Treasury; copies mailed to Lilliam A. McEwen.
Aug 8	COPIES of docket entries & notice of appeal transmitted to USCA. USCA # 80-1939.
Aug 21	RECORD ON APPEAL delivered to USCA. Receipt acknowledged

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 79-1251

May 3, 1979

GROLIER INCORPORATED, a corporation,
Old Sherman Turnpike,
Danbury, Connecticut, PLAINTIFF

v.

FEDERAL TRADE COMMISSION; MICHAEL PERTSCHUK, Chairman; PAUL RAND DIXON, Commissioner; DAVID M. CLANTON, Commissioner; and ROBERT PITOFSKY, Commissioner, DEFENDANTS

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF UNDER THE FREEDOM OF INFORMATION ACT

Plaintiff Grolier Incorporated complains of the above-named defendants as follows:

I

Jurisdiction And Venue

1. This Court has jurisdiction over the subject matter of this action pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552(a)(4)(B), and Sections 1331 and 1361 of the Judicial Code, 28 U.S.C. §§ 1331 and 1361. Venue is properly laid in the District of Columbia,

the judicial district in which the defendants reside and in which the cause of action has arisen, pursuant to 28 U.S.C. § 1391(e).

II

The Parties

2. Plaintiff Grolier Incorporated (hereinafter "Grolier") is a corporation organized and existing under the laws of the State of Delaware, with its principal office located in Danbury, Connecticut. Grolier owns and holds all the outstanding stock of each and every other corporation designated in Specification 2 of its Freedom of Information Act Request dated June 28, 1978 (attached hereto as Exhibit A). Plaintiff Grolier and each and every other corporation named in Specification 2 of its Request are appellants in a proceeding currently pending before the United States Court of Appeals for the Ninth Circuit to review an order entered by defendant Federal Trade Commission, entitled *Grolier Incorporated v. Federal Trade Commission*, No. 78-2159.

3. Defendant Federal Trade Commission (hereinafter "FTC") is an independent regulatory agency of the United States Government, organized and existing pursuant to Section 1 of the Federal Trade Commission Act, 15 U.S.C. § 41. The FTC is subject to the document disclosure provisions of the Freedom of Information Act, 5 U.S.C. § 552.

4. Defendant Michael Pertschuk is a member and Chairman of defendant FTC, and defendants Paul Rand Dixon, David M. Clanton and Robert Pitofsky are members of defendant FTC, each having been duly appointed by the President, and each having taken oath and entered upon the duties of a member of the Commission; pursuant to statute they are duly qualified and voting members of the FTC.

III

Nature Of The Controversy

5. By a complaint dated March 9, 1972, the FTC commenced an administrative adjudicative proceeding against plaintiff Grolier and fourteen of its wholly-owned subsidiaries. The short title of that administrative proceeding is "*In the Matter of Grolier Incorporated*, Docket No. 8879."

6. The complaint in the above-mentioned proceeding before the FTC charges Grolier and its subsidiaries with a variety of unfair and deceptive acts and practices in commerce. An Order and Opinion of the Commission was issued by the FTC on March 13, 1978.

7. On or about June 20, 1978, counsel for Grolier Incorporated, Furth, Fahrner & Wong, attempted to obtain, by a written request, pursuant to 5 U.S.C. § 552 and § 4.11 of defendant FTC's Rules of Practice, a number of records and documents referring or relating to any covert investigations (as defined therein) of Grolier or its subsidiaries conducted by defendant FTC. A photocopy of plaintiff Grolier's Freedom of Information Act Request (hereinafter "FOIA request") is attached hereto as Exhibit A, and is incorporated herein by reference.

8. Defendant FTC responded to plaintiff's FOIA request by a letter dated July 12, 1978, from the Secretary of defendant FTC to plaintiff's counsel. A photocopy of this letter in response is attached hereto as Exhibit B, and is incorporated herein by reference. It stated in substance that plaintiff's FOIA request was denied; no information responsive to Specifications 1 and 2 was located; and Specification 3 was alleged to be unreasonably burdensome and the few documents which were found were alleged to be exempt from mandatory disclosure pursuant to 5 U.S.C. § 552(b)(5) relating to inter-agency or intra-agency memoranda.

9. On or about August 3, 1978, pursuant to § 4.11(a)(2) of defendant FTC's Rules of Practice, plaintiff ex-

hausted its administrative remedy by taking an appeal to defendant FTC's General Counsel from the initial determination denying access to certain of the requested records. Plaintiff's administrative appeal was based on the grounds that none of the records withheld are exempt from disclosure under the Freedom of Information Act and that the Commission would not be unreasonably burdened if it were required to conduct a reasonable search for records described in the third specification of plaintiff's FOIA request. In the alternative—and in the event defendant FTC decided to deny the administrative appeal on the exemption grounds—plaintiff requested defendant FTC to exercise its discretion to release the withheld records, and in that connection advised defendant FTC that plaintiff was one of the respondents in the abovementioned adjudicative proceeding (Docket No. 8879), and that plaintiff believed that such records may have some bearing on certain issues raised in that proceeding. A photocopy of plaintiff's letter of appeal is attached hereto as Exhibit C, and is incorporated herein by reference.

10. By letter dated October 12, 1978, from the General Counsel of defendant FTC to plaintiff's counsel, defendant FTC advised plaintiff that the administrative appeal was granted as to certain documents and denied as to others. General Counsel of defendant FTC advised plaintiff that one "covert" investigation had been located involving a civil penalty action brought against the Americana Corporation in 1972 by the Justice Department. Defendant FTC denied disclosure of documents related to this covert investigation on the grounds of an exemption from FOIA disclosure covering "internal Commission memorandum." Defendant FTC also denied plaintiff's request for a reasonable search for records described in the third specification of plaintiff's FOIA request on the grounds that such specification "does not come within the

definition of identifiable records as outlined by either § 552(a)(3) of the FOIA or § 4.11(ii) of the FTC's Rules of Practice." A photocopy of the General Counsel's letter is attached hereto as Exhibit D, and is incorporated herein by reference.

V

Offenses Charged

11. Defendants have committed the following violations of law in processing plaintiff's FOIA request:

a. Defendants have erroneously claimed an exemption for, and have refused to produce, certain requested records which are not protected by any recognized exemption, in violation of the FOIA; and

b. Defendants have failed to advise plaintiff of the identity and existence of all the requested records, and precisely which of the requested records are claimed to be exempt from production and which are not; this failure constitutes a violation of 5 U.S.C. § 552(a)(6)(A)(i), which requires defendant FTC to "notify" a person making an FOIA request of its determination "whether to comply with such request" and "the reasons therefor."

Demand for Relief

WHEREFORE plaintiff requests that this Court:

A. Render a declaratory judgment adjudicating that all documents which plaintiff has requested in Specifications 1 and 2 of its FOIA request are not exempt from disclosure and must therefore be produced to plaintiff;

B. Issue an injunction, prohibiting defendants from withholding the requested records, and commanding defendants to produce all records which have been improperly withheld from plaintiffs;

C. Assess against the United States Government the reasonable attorneys' fees and other litigation costs which plaintiff has incurred in bringing this action; and

D. Grant plaintiff such other and further relief as the Court may deem just and proper in the premises.

DATED: May 2, 1979
San Francisco, California

FREDERICK P. FURTH
THOMAS R. FAHRNER
BRUCE J. WECKER
FURTH, FAHRNER & WONG
235 Montgomery Street, Suite 1330
San Francisco, California 94104
Telephone: (415) 433-2070

By /s/ [Illegible]
SAMUEL H. SEYMOUR
RENE A. TORRADO, JR.
SEYMOUR & DUDLEY
1901 L. Street, N.W.
Washington, D.C. 20036
Telephone: (202) 452-1711

By _____

EXHIBIT A

LAW OFFICES
FURTH, FAHRNER & WONG
Russ Building, Suite 1330
San Francisco, California 94104
Telephone (418) 433-2070
Cable Bengoshi San Francisco

June 20, 1978

Freedom of Information Act Request
Office of the Secretary
Federal Trade Commission
Washington, D.C. 20580

To The Commission:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended, and pursuant to § 4.11 of the Commission's Rules of Practice, we hereby request, on behalf of our client Grolier Incorporated, that the Commission make promptly available to us for inspection and copying the following records and documents:

1) All records and documents which refer or relate to a covert investigation of Americana Corporation and/or Grolier Incorporated, which was made in or about April 1973, by a Federal Trade Commission consumer protection specialist named Wendell A. Reid; and

2) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any of the following companies:

a) Grolier Incorporated
b) Grolier Interstate, Inc.
c) Americana Corporation
d) Spencer International Press, Inc.
e) R. H. Hinckley Company

f) The Richards Company
g) Grolier Society, Inc.
h) Madison Enterprises, Inc.
i) Grolier New Era Corporation
j) Grolier Enterprises, Inc.
k) Grolier Reading Programs, Inc.
l) Career Institute, Inc.
m) Americana Interstate, Inc.
n) American People's Press, Inc.

3) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any person, company or other entity.

As used in the three preceding paragraphs, the phrase "covert investigation" refers to any investigation of which the subject entity was not notified in advance and prior to acts taken pursuant to such investigation.

Pursuant to § 4.11(a)(1)(i)(c) of the Commission's Rules of Practice, we hereby specifically advise you that we are willing to pay, in accordance with § 4.8(c) of the Commission's Rules, whatever fees may be charged for processing this Freedom Of Information Act request. No waiver of fees is requested.

Very truly yours,

FURTH, FAHRNER & WONG

By /s/ [Illegible]
Counsel for
Grolier Incorporated

FPF:szb

CC: Richard M. Clark, Esq.

EXHIBIT B

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Office of the Secretary

July 12, 1978

Frederick P. Furth, Esquire
Furth, Fahrner & Wong
Russ Building, Suite 1330
San Francisco, California 94104

Re: Freedom of Information Act Request
Grolier Society, Inc.
D. 8879

Dear Mr. Furth:

This is in response to your letter of June 20, 1978 requesting information concerning the above.

We have no information responsive to Specification 1 of your request. Mr. Wendell A. Reid was an employee of our New York Regional Office until April 22, 1977. When Mr. Reid left the Commission he either took his personal files or they were destroyed. The official files of that office do not indicate that Mr. Reid was assigned to any matters related to Grolier.

Three investigations of the companies listed in Specification 2, Grolier Society, Inc., D. 8879, Grolier Society, Inc., C. 753, and Grolier Incorporated, C. 2189, were located. A careful search of the files in these matters failed to locate any information related to "covert investigations".

Section (a) (3) (A) of the act requires that information being sought must be reasonably identified. This section of the act also requires that a request be specific enough to allow the location of the records being sought without an unreasonable burden being placed on the agency. Your

third specification would require a search of the millions of documents contained in every investigatory file in the Commission. This would be an unreasonable burden. However, we have discussed this matter with knowledgeable persons in the Commission. These discussions have identified a few documents which are responsive to your request. These documents will not be released to you because they are exempt from mandatory disclosure pursuant to 5 U.S.C. Section 552:

> (b) (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

You may petition the Commission for access to the material which is being withheld within thirty (30) days. You may petition either because you believe that the material is not exempt under the law, or because you believe that the Commission should exercise its discretion and release the information notwithstanding its exempt status. If requesting discretionary release, you should state your interest in the subject matter and the purpose for which it would be used if access is granted. The request should be addressed Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Please include a copy of your original letter and this response with your appeal.

The undersigned is deemed the sole official responsible for the denial of your request.

Sincerely,

/s/ Carol M. Thomas
CAROL M. THOMAS
Secretary

EXHIBIT C

LAW OFFICES
FURTH, FAHRNER & WONG
Russ Building, Suite 1330
San Francisco, California 94104
Telephone (415) 433-2070
Cable Bengoshi San Francisco

August 3, 1978

Freedom Of Information Act Appeal
Office of the General Counsel
Federal Trade Commission
Sixth and Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Sir:

Pursuant to Section 4.11(a)(2) of the Commission's Rules, we hereby appeal the Commission's denial of our Freedom of Information Act request. A copy of our request, dated June 20, 1978, is attached as Exhibit A, and a copy of the Secretary's response, dated July 12, 1978, is attached as Exhibit B.

The Secretary's letter of July 12, 1978 states that the Commission has "identified a few documents which are responsive to [our] request", but that such documents "will not be released . . . because they are exempt from mandatory disclosure" pursuant to 5 U.S.C. Section 552 (b)(5). The Secretary further observes in his letter of July 12, 1978 that the third specification of our request "would require a search of the millions of documents contained in every investigatory file in the Commission", and concludes that "this would be an unreasonable burden".

We have received no list or index of the allegedly "exempt" documents mentioned in the Secretary's letter of July 12, 1978, and we are therefore unable to present a detailed argument as to whether such documents are in fact covered by the exemption set forth in 5 U.S.C. Sec-

tion 552(b)(5). We submit, however, that none of such documents are exempt from mandatory disclosure under that provision or any other provision of the Act, and we therefore request that the Commission make such documents promptly available to us. Further, we submit that the Commission will not be unreasonably burdened if it is required to conduct a reasonable search for the records described in the third specification of our request. We therefore submit that these records also should be made promptly available to us.

If the Commission determines that any or all of the documents in question are in fact exempt under the Act, we request that the Commission exercise its discretion to release such records. Pursuant to Section 4.11(2)(i)(c) of the Commission's Rules, we hereby advise the Commission that our client Grolier Incorporated is one of the respondents in an adjudicative proceeding now pending before the Commission (Docket No. 8879), and we seek access to the records in question because we believe such records may have some bearing on certain issues raised in that proceeding.

Very truly yours,

FURTH, FAHRNER & WONG

By /s/ Thomas R. Fahrner
THOMAS R. FAHRNER

TRF/emc

enclosures

EXHIBIT D

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

12 Oct. 1978

Office of the General Counsel

Thomas R. Fahrner, Esquire
Furth, Fahrner & Wong
Russ Building, Suite 1330
San Francisco, California 94104

Dear Mr. Fahrner:

This is in reply to your August 3, 1978, Freedom of Information Act appeal for documents in our files concerning the Commission's use of "covert" activities in any investigations of persons or companies.

Because of the broadness of your definition of "covert", which would include any preliminary investigatory work done without the foreknowledge of any individual or company investigated by the Commission's staff, a large number of investigations the Commission has considered or conducted could be construed to be responsive to your request. This would involve, as the Secretary's July 12, 1978, letter pointed out, a search of millions of Commission documents to ascertain which documents concerned previously unannounced investigatory activities. Your request, therefore, does not come within the definition of "identifiable records" as outlined by either § 552(a)(3) of the Freedom of Information Act or § 4.11(ii) of the Commission's Rules of Practice. An agency is not required under the Freedom of Information Act to conduct a search of every file in the agency in an effort to locate responsive material where those files are not brought together and worked upon as a group.[1]

---

[1] *Cable Television Association, Inc.* v. *FCC*, 479 F.2d 183 (1978) at 192. See also, *Mason* v. *Callaway*, 554 F.2d 123 (4th Cir. 1977).

As Ms. Mary Fields of my staff explained to you in a phone conversation on August 16, 1978, our Office has agreed to make a reasonable search of its records to locate material responsive to your request. In an effort to accomplish this, each of the Assistant Directors in the Commission's many bureaus has been queried as to any investigations within his jurisdiction or knowledge involving covert activities (as defined in your letter). I understand that at the present time this effort is acceptable to you as a fulfillment of your request.

One Commission investigation has been identified which is responsive to Items 1 and 2 of your request. This was a civil penalty action brought against the Americana Corporation in 1972 by the Department of Justice.[2] All material collected by Mr. Wendell Reid of the Commission's staff in that instance were made available to Americana's counsel. There are several internal Commission memoranda concerning this case which are responsive to your request. However, they contain primarily deliberations and recommendations of staff, with factual information so intertwined as to preclude segregation. No other investigations have been identified responsive to those items.

My staff have been able to locate several Commission investigations wherein investigatory work was done without the foreknowledge of the individual or company that would come within your definition of "covert." In several of these cases much of the material collected and staff's underlying notes have already been placed on the public record. Some of the material in our files consist of legal documents filed by the parties involved and which refer to the investigatory activities in question. These documents are also publicly available.

After careful consideration, I have determined to grant your appeal with respect to certain documents or portions of documents. Other documents or portions of documents

---

[2] Civil Action No. 388-2 DN.N.J. (1977); FTC Docket No. 5085.

are exempt from mandatory public disclosure pursuant to 5 U.S.C. § 552(b)(5) and are being withheld. These documents contain deliberations, opinions and recommendations of staff and are not required to be made public. The release of this material would discourage frank and open discussion, and thus hinder the Commission in its deliberations. For these reasons, therefore, release of exempt material is not required, and I have determined not to grant discretionary release. Factual information contained in the partially exempt documents is being released to you.

For access to the requested material that is being released or is on the public record, please contact Mr. Keith Golden, Freedom of Information and Privacy Act Branch, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580 (202) 528-3562.

In accordance with 5 U.S.C. § 552(a)(6)(C), you are advised that the undersigned is solely responsible for the denial of this appeal.

Sincerely,

/s/ Michael N. Sohn
MICHAEL N. SOHN
General Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER, INC., PLAINTIFF

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the complaint insofar as any documents withheld from plaintiff are exempt from compelled disclosure pursuant to 5 U.S.C. § 552(b).

Third Defense

In answer to the numbered paragraphs of the complaint, defendants, by their undersigned attorneys, hereby admit, deny and aver as follows:

1. No response is required to allegations of jurisdiction.
2. Defendants have no knowledge as to the truth of this allegation.

3-6. Admitted.

7. Defendants admit that on or about June 20, 1978, the Federal Trade Commission received the request attached to the complaint as Exhibit A.

8. Defendants admit that the Commission responded to plaintiff's FOIA request by a letter from the Commission's Secretary, dated July 12, 1978 attached to the complaint as Exhibit B.

9. Defendants admit that on or about August 3, 1978 plaintiff filed an appeal to the Commission's General Counsel, a copy of which is attached to the complaint as Exhibit C.

10. Defendants admit that the Commission responded to plaintiff's appeal by a letter from the General Counsel dated October 12, 1978 and attached to the complaint as Exhibit D, and that as a result of the appeal certain documents were made available in their entirety. Portions of others were made available, and some were withheld in their entirety, pursuant to exemptions listed in 5 U.S.C. § 552(b).

11. Denied.

Prayer For Relief: Defendants deny that plaintiff is entitled to any relief whatsoever. All allegations not admitted or specifically denied are denied.

Respectfully submitted,

EARL J. SILBERT
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

LILLIAN A. MCEWEN
Assistant United States Attorney

Of Counsel:
MICHAEL N. SOHN
General Counsel
GERALD P. NORTON
Deputy General Counsel
W. DENNIS CROSS
Assistant General Counsel
CHARLES D. NELSON
Attorney
Federal Trade Commission
Washington, D.C. 20580
(202) 523-3463

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER INC., PLAINTIFF

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

MOTION OF DEFENDANTS FOR DISMISSAL OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The defendants hereby move to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the grounds that the complaint fails to state a claim upon which relief can be granted and that the Court lacks jurisdiction over the subject matter of the action; or, in the alternative for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law.

In support of this motion, defendants submit herewith an Index of Documents Withheld, a Statement of Material Facts as to Which there is No Genuine Issue, filed pursuant to Local Rule 1-9(h), and a memorandum with attachments.

Respectfully submitted,

CARL S. RAUH
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

/s/ Lillian A. McEwen

LILLIAN A. MCEWEN
Assistant United States Attorney

Of Counsel:

MICHAEL N. SOHN
General Counsel

W. DENNIS CROSS
Assistant General Counsel

CHARLES DAVID NELSON
Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER INCORPORATED, PLAINTIFFS

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE, FILED PURSUANT TO LOCAL RULE 1-9(h)

Defendants submit that the following facts are undisputed:

1. Defendant, Federal Trade Commission ("Commission") is an agency of the United States. (Complaint, at 2.)

2. Defendants, Michael Pertschuk, Paul Rand Dixon, David M. Clanton, and Robert Pitofsky are members of the Federal Trade Commission. (Complaint, at 3.)

3. By letter dated August 3, 1978, Furth, Fahrner & Wong, attorneys for plaintiff, Grolier Incorporated ("Grolier") requested that the Commission make available certain documents, pursuant to the provisions of the Freedom of Information Act, 4 [sic] U.S.C. 552, as amended. (Grolier Exh. A.)

4. By letter dated July 12, 1978, the Secretary of the Commission denied the Request. (Grolier Exh. B.)

5. By letter dated August 3, 1978, Grolier appealed the denial of its request to the Commission. (Grolier Exh. C.)

6. By letter of October 12, 1978, the General Counsel, acting for the Commission, denied Grolier's appeal in part and granted it in part. (Grolier Exh. D.)

7. The instant law suit was filed on May 4, 1979, for access to certain documents or portions of documents which were not released by the Commission to defendant [sic], on appeal.

8. By letters of September 27 and 28 and October 5, 1979, the General Counsel amended the Commission's action of October 12, 1978, and made several hundred documents containing more than 7,000 additional pages available to the requestor. (Letters of Michael N. Sohn, Def. Exs. 1, 2 and 3.)

9. Plaintiff Grolier, is also plaintiff in a proceeding to review an order of the Commission, Grolier Incorporated v. Federal Trade Commission, now pending in the U.S. Court of Appeals for the Ninth Circuit (No. 78-2159). The action in the Ninth Circuit is not directly related to this action.

10. The Commission has withheld from its law enforcement files relating to the Americana Corporation, the Bestline Products Corporation and Montgomery Ward & Company, intra-agency memoranda of a pre-decisional nature, attorney work product, attorney-client communications, and memoranda of mental impressions.

11. Other documents withheld by the Commission are pre-decisional, intra-agency memoranda of a policy making nature. (Def. Exhs. G, I, J, K, and L.)

Respectfully submitted,

CARL S. RAUH
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

/s/ Lillian A. McEwen

LILLIAN A. MCEWEN
Assistant United States Attorney
United States Courthouse
3d and Constitution Avenue, N.W.
Washington, D.C. 20001
(202) 633-1886

Of Counsel:

MICHAEL N. SOHN
General Counsel

W. DENNIS CROSS
Assistant General Counsel

CHARLES DAVID NELSON
Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER INCORPORATED, PLAINTIFF

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

AFFIDAVIT OF KENT C. HOWERTON

DISTRICT OF COLUMBIA)
) ss
CITY OF WASHINGTON)

KENT C. HOWERTON, being first duly sworn, deposes and says:

1. I have been employed by the Federal Trade Commission ("Commission") as an attorney since September of 1969. From 1972 through 1976, I was assigned to serve "of counsel" to the Department of Justice which was bringing a civil penalty suit against the Americana Corporation ("Americana"), in Federal District Court, under the authority of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.*, at the request of the Commission. I had previously reviewed the investigation of Americana's compliance with a Commission order relating to sales practices which gave rise to the civil penalty action.

2. As a result of the facts described above, I am thoroughly familiar with the Commission's files relating to the investigation of Americana's practices and the lawsuit which resulted from that investigation.

3. I have read the Complaint, herein, and the portion of the Index to Documents which describes withheld documents relating to the Americana Corporation. The Index accurately describes the documents withheld.

4. Most of the documents in the Americana files relating to covert investigation were made public when put in the record in *United States* v. *Americana Corporation*, No. 388-72 (D.N.J.), in response to discovery requests by the defendants in that action. Additional documents and portions of documents were made available to the requestor in response to the FOIA request herein.

5. The few remaining documents withheld are attorney work product, attorney-client communications, and intra agency memoranda of a policy making nature. Document No. 1 contains advice which I gave to the Commission during the course of litigation regarding the available alternative strategies. When this document was prepared, the Commission was in the process of determining whether attorney's rough notes compiled in trial preparation would be given to the opposing party in compliance with a court order. All segregable factual portions of this memorandum have been disclosed; only opinions, evaluations and recommendations have been withheld. Document No. 2 is a draft of document No. 1. It was not sent or circulated. It reveals my thoughts as I developed the recommendations contained in the memorandum of advice which was eventually sent to the Commission. Document Nos. 3, 5, 6 and 7 record discussions and instructions relating to investigative methods and goals during the course of the litigation. These documents reveal my thought processes in the preparation of the Commission's case for litigation. Document No. 4 is a letter from the Commission, through its Secretary, to its attorney, the Department of Justice. This letter contains directions for the conduct of litigation on behalf of the Commission.

6. Disclosure of the documents described above deprive the Commission of the protections of the attorney-client and attorney work product privileges and would be a

deterrent to free and frank communication between the Commission and its attorneys and to full and careful trial preparation.

/s/ Kent C. Howerton
KENT C. HOWERTON

Subscribed and sworn to before me this 9th day of October, 1979.

/s/ [Illegible]
Notary Public

My Commission expires Aug. 14, 1981.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER INCORPORATED,
575 Lexington Avenue,
New York, New York 10022, PLAINTIFFS

v.

FEDERAL TRADE COMMISSION, ET AL.,
6th and Pennsylvaia Avenue, N.W.,
Washington, D.C. 20580, DEFENDANTS

INDEX TO DOCUMENTS

Plaintiff sought access to three categories of records and documents of the FTC: 1) records and documents relating to a covert investigation of Americana Corporation and/or Grolier Incorporated, made in or about April 1973 by Federal Trade Commission Consumer Protection Specialist Wendell A. Reid; 2) records and documents referring or relating to any covert investigation by the Federal Trade Commission of twelve companies specifically named in the request; and, 3) records and documents referring or relating to any covert investigation made by any employee of the Federal Trade Commission of any person, company or other entity. The Federal Trade Commission's Secretary initially responded by stating that no records responsive to specifications (1) and (2) of the request had been identified. The Secretary stated that the third specification failed reasonably to identify the information sought and compliance with the request would place an unreasonable burden on the agency; further, the Secretary indicated that those records responsive to specification 3 which had been identified were exempt from mandatory disclosure.

In response to Plaintiff's appeal the General Counsel released fully or in part 124 documents comprising 414 pages. In addition, documents consisting of more than 7000 pages were made available to the requestor by the General Counsel on September 27, 1979 and September 28, 1979. (Def. Exhs. A and B, Letters of Michael Sohn). Those documents which continue to be withheld are exempt from disclosure pursuant to 5 U.S.C. § 552 (b)(5) and 7(C). Records withheld and applicable exemptions are identified in the following index.

Note: The numbers in parentheses at the left margin indicate the specific exceptions or subsections of 5 U.S.C. § 552(b) applicable to each document or group of documents. The factual bases for exempting these documents are fully described in the affidavits of Carol M. Thomas, Mary Fields, Kent C. Howerton, Randolph W. Tritell, William S. Sanger, Scott Klurfeld, Terry Latanich, Benita A. Sakin, Rachel Miller and John J. Phelan. (Def. Exhs. C through L, respectively).

CATEGORY A—RECORDS RELATING TO COVERT INVESTIGATION OF AMERICANA CORPORATION OR GROLIER INCORPORATED IN APRIL 1973

The following documents relate to the Commission's investigation of the Americana Corporation (Americana), then a subsidiary of Grolier, Inc., and to *United States* v. *Americana Corporation*, Civ. No. 388-72 (D.N.J.).

DOCUMENTS WITHHELD IN PART

Doc. # 1

(5) September 9, 1976. Fourteen pages, nine withheld.

A memorandum *to* the Commission *from* Kent C. Howerton, Attorney. This memorandum sets out and evaluates various litigation strategies available to the Commission in response to an order to turn

over to defense counsel certain of the trial preparation materials prepared by the Commission's attorneys and to answer certain interrogatories concerning communications between the Commission's counsel and witnesses, Commission employees, and the Commission itself. The portions not disclosed contain evaluations, opinions, and recommendations of the attorney. These portions are exempt from disclosure as privileged communications between attorney and client, as attorney work product, and as pre-decisional, intra-agency communications.

DOCUMENTS WITHHELD IN FULL

Doc. # 2

(5) Undated. Nineteen pages. This document is a draft of document # 1 described above. It is exempt from disclosure as a predecisional, intra-agency communication, as attorney-client communication, and as attorney work product.

Doc. # 3

(5) November 13, 1973. One page. Memorandum *from* Wendell A. Reid, Consumer Protection Specialist, New York Regional Office, *to* the Division of Compliance, Bureau of Consumer Protection. This document contains instructions of Attorney Howerton relating to procedures to be used in investigating the practices of the Americana Corporation for trial preparation. It is exempt from disclosure as attorney work product.

Doc. # 4

(5) October 15, 1976. Two pages. Letter *from* Charles A. Tobin, Secretary of the Commission, *to* Charles R. McConachie, Acting Chief, Consumer Affairs Section, Anti-trust Division, U.S. Department of Justice, setting forth the Commission's decision as to

the method of handling litigation in *U.S.* v. *Americana*. This document is exempt from disclosure as attorney-client communication.

Doc. # 5

(5) June 29, 1973. One page. Memorandum *to* compliance file *from* Kent Howerton, Attorney. This memorandum indicates the contents of discussions in which instructions regarding the investigation of Americana Corporation were given by Attorney Howerton. The memorandum indicates Mr. Howerton's thought processes in the preparation of the case and is exempt from disclosure as attorney work product.

Doc. # 6

(5) April 4, 1973. Two pages. A Memorandum *from* Kent C. Howerton *to* Alfred W. Cortese, Jr., Assistant Executive Director for Legal Coordination. This document contains an evaluation of the existing investigation of the Americana Corporation and recommendations related to obtaining additional evidence. It was prepared in contemplation of litigation and contains evaluations, recommendations, and opinions of counsel. It is exempt from disclosure as attorney work product.

Doc. # 7

(5) April 3, 1973. One page. Memorandum *to* the compliance file in the Americana case *from* Kent C. Howerton, Attorney. It records actions taken by attorney Howerton in relation to the investigation of Americana's practices which resulted in the filing of a civil penalty action. This memorandum reveals the thought processes of the attorney preparing the Commission's case and is exempt from disclosure as attorney work product.

* * * *

EXHIBIT A

Date: 9 Sep. 1976

MEMORANDUM

To: Commission

From: Kent C. Howerton, Attorney
Division of Compliance
Bureau of Consumer Protection

Subject: *U.S.* v. *Americana Corporation*
Civil No. 388-72, D.N.J.
F.T.C. Docket 5085

EXPEDITED CONSIDERATION NECESSARY AS SOON AS POSSIBLE.

INTRODUCTION

U.S. District Court Judge Clarkson Fisher has ordered the Government in this civil penalty proceeding to turn over to defendant certain trial preparation materials (including rough notes of interviews with consumer witnesses taken by Commission and Department of Justice attorneys in charge of the litigation and other intra-agency memoranda) and to answer certain Interrogatories we had refused to answer. This memorandum is submitted pursuant to Section 4.11(c) of the Commission's Rules of Practice. That provision requires any employee who is served with a subpoena or other compulsory process requiring the production of any document or record or the disclosure of any information which under Section 4.10 is exempt from availability for public inspection and copying to advise the Commission of the service of the compulsory process, the nature of the documents or information sought, and all relevant facts and circumstances.

BACKGROUND AND STATUS OF CASE

The Commission certified facts alleging violation of its order in Docket 5085 by Americana Corporation and thereafter the Department of Justice filed the civil penalty complaint on February 29, 1972. Staff of the Commission's Division of Compliance have appeared "Of Counsel" and have actively participated with staff of the Consumer Affairs Section of the Department of Justice in the case since December, 1973. The protracted proceedings in this matter are due largely to the extensive discovery conducted by the parties (including several sets of Interrogatories, Requests for Admissions, Requests for Production of Documents, depositions of consumer witnesses conducted by both parties, depositions of defendant's former or current officers conducted by plaintiff and depositions of the Commission's attorney-investigator Moira McDermott conducted by defendant), in addition to numerous discovery motions and oral arguments before the U.S. Magistrate handling discovery matters and before the U.S. District Court Judge assigned to the case.

The civil penalty complaint charges defendant Americana Corporation with:

(a) two counts of representing in advertisements that the *Encyclopedia Americana* contains more articles than any other set in violation of paragraph 2 of the Commission's order in Docket 5085; and

(b) twenty counts of misrepresenting in door-to-door sales to consumers that its publication is available only to selected individuals under special conditions, that individuals employed to sell its publications are anything other than salesmen soliciting prospects to purchase the publication at prices regularly established by defendant, and/or that a price in excess of the price at which the publication is customarily offered for sale and sold in the usual course of business is its customary or usual

price in violation of paragraphs 4, 5 and 6 of the Commission's order.

On February 26, 1974, Judge Fisher ruled on a previous Rule 37(a)(2), Fed. R. Civ. P., motion by defendant for an order compelling certain discovery of plaintiff. A copy of Judge Fisher's Memorandum and Order is attached hereto. Judge Fisher ordered plaintiff to turn over trial preparation materials of the Commission's attorney who conducted the original investigation (Moira McDermott), including her rough notes and memoranda regarding her interviews with customers of defendant. Although Judge Fisher held that Miss McDermott's notes of the interviews were squarely within the qualified protection of trial preparation materials of Rule 26(b)(3), Fed. R. Civ. P., he further held that defendant had met its burden under that Rule "to illustrate [its] substantial need for these documents and [its] inability, without undue hardship, to obtain them or their substantial equivalent by other means". Judge Fisher ordered plaintiff to turn over those materials. Pursuant to that Court order and the Commission's minutes of September 26, 1973, and January 30, 1974, directing that we could produce all investigatory or other files complied in this case since November, 1969, if so ordered by the Court, we turned over the materials to defendant.

Judge Fisher did not order plaintiff, as requested by defendant, to turn over trial preparation materials (rough notes and typed memoranda of interviews with consumer witnesses) of the Consumer Affairs Section and Compliance Division attorneys who were conducting the litigation for plaintiff (including those of interviews conducted prior to filing of the Complaint). He specifically denied defendant's motion that plaintiff turn over inter or intra-agency memoranda. We relied on that order as to the type of notes we took when we thereafter conducted further interviews with our consumer witnesses.

Following numerous further discovery arguments, the U.S. Magistrate, on November 12, 1975, and January 12,

1976, orally ordered plaintiff to turn over additional trial preparation documents prepared by Department of Justice and Compliance Division attorneys conducting the litigation, including notes of consumer witness interviews which he previously had not ordered plaintiff to produce, and to answer Interrogatories to which it had made objections.

Basically, the Magistrate's order requires the Government to:

(1) Produce the following documents:

(A) All rough notes or other memoranda prepared by plaintiff's litigating attorneys regarding any interviews or oral or written communications with consumer witnesses;

(B) All documents relating to plaintiff's litigating attorneys' communications with Commission attorney-investigator Moira McDermott since she ceased working for the Commission;

(C) All documents relating to Commission investigator Wendell Reid's communications with defendant or any subsidiary thereof, including plaintiff's litigating attorneys' communications with Reid and intra-agency memoranda relating thereto.

(2) Answer Interrogatories with specific page references to any documents regarding the following:

(A) Plaintiff's litigating attorneys' knowledge of all oral communications with consumer witnesses;

(B) Any knowledge of inconsistent statements made by consumer witnesses, including those contained in documents in the possession of defendant;

(C) All oral or written communications between plaintiff and Moira McDermott since she ceased working for the Commission;

(D) All admissions or declarations against interest on which the plaintiff will rely;

(E) All documents and written communications referring or relating to the investigation;

(F) All written reports or memoranda prepared during the investigation and prior to the filing of the Complaint;

(G) All oral communications referring or relating to the investigation prior to the filing of the Complaint;

(H) Who made the decision to institute the law suit;

(I) All oral communications or documents referring or relating to any recommendations made on the basis of the investigation;

(J) Each person interviewed or contacted during the investigation, including a complete description of the knowledge of each and all oral communications and documents in relation thereto.

Plaintiff filed its appeal to U.S. District Court Judge Fisher. Defendant made no showing that its counsel had ever even attempted to obtain the "substantial equivalent" [Rule 26(b)(3)] of the trial preparation documents (rough notes and memoranda regarding interviews with consumer witnesses) by interviewing the witnesses themselves or by other means. However, on April 7, 1976, Judge Fisher ordered plaintiff to turn over the documents and in every respect upheld the Magistrate's order.

The reference above to Commission investigator Wendell Reid must be further explained here. By memorandum of April 4, 1973, upon the request of the Consumer Affairs Section, we requested that the Commission's New York Regional Office conduct a supplemental investigation by having an attorney or CPS enroll in the sales personnel training course at one of defendant's sales offices without identifying himself or herself as an employee of the Commission to obtain evidence concerning

the sales training materials and instructions then being given to defendant's sales trainees. Mr. Wendell Reid of that office attempted to enroll in one such training course but instead was assigned to a sales office of a subsidiary of defendant. He met with representatives of that subsidiary on two or three occasions and received a few written sales pitches, and other materials. Following a public announcement by the Commission that it was not in favor of conducting investigations utilizing undercover tape recording of meetings, etc., I telephoned Mr. Reid on June 29, 1973, and instructed him to conduct no further investigation. He complied and later forwarded a memorandum dated November 13, 1973, to the Division of Compliance formally closing that supplemental investigation.

In a discovery response we filed on December 3, 1973, we identified the April 4 and November 13, 1973, intra-agency memoranda. Thereafter, we turned over copies of all documents Mr. Reid obtained from defendant's subsidiary but refused to produce the intra-agency memoranda. Defendant did not indicate that it was aware of the Reid supplemental investigation until during depositions we took of defendant's officers in the summer of 1975. Defendant made a further specific demand for these intra-agency memoranda and any other documents that exist relating to that supplemental investigation. Plaintiff claimed privilege but Judge Fisher has now ordered them produced. The only ones I am aware of are: (1) my memorandum of April 4, 1973, to the New York Regional Office; (2) my memoranda to the Compliance File of April 3 and June 29, 1973; (3) Mr. Reid's memorandum of November 13, 1973; and (4) Maurice S. Meyer's two memoranda of January 23, 1974, to J. Thomas Rosch (reporting on Mr. Reid's activities in response to the request for information from Senator Henry Jackson regarding monitoring conversations). A copy of each of those documents is attached hereto. Mr. Reid has been unable to find any other materials still in his possession.

Following the April 7 ruling, the Consumer Affairs Section staff forwarded to the Department's Appellate Section, Anti-Trust Division its recommendation against filing an appeal of the discovery order in the U.S. Circuit Court of Appeals. Thereafter, settlement negotiations were conducted and the Appellate Section's consideration was delayed pending the results of those negotiations. The negotiations proved fruitless. The Appellate Section has now returned to the Consumer Affairs Section the recommendations which its staff, its Deputy Chief and its Chief would make to the Solicitor General regarding an appeal.

• • • •

ANALYSIS OF CASE AT PRESENT AND ALTERNATIVES

Case at Present:

The civil penalty matter as originally certified contained two counts based on advertising and twenty counts based on door-to-door sales to consumers. During the course of discovery, plaintiff agreed to drop one of the consumer counts because of problems which surfaced during the taking of the consumer's deposition. Since the complaint was filed under provisions of the F.T.C. Act which then set a maximum civil penalty at $5,000 per violation, the remaining 21 counts could result in a maximum civil penalty of only $105,000.

Defendant now has in its possession rough notes of interviews with consumer witnesses made by the Commission's attorney-investigator, affidavits of those consumer witnesses obtained by the attorney-investigator, and extensive transcripts of depositions of both the consumer witnesses and the commission's attorney-investigator.

[seven blank pages followed]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER, INC., PLAINTIFF

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

[Filed Feb. 21, 1980]

MEMORANDUM

This Freedom of Information Act ("FOIA") case comes before the court on cross-motions for summary judgment. The plaintiff seeks the disclosure of certain documents withheld by the Federal Trade Commission ("FTC"). The court will grant summary judgment on behalf of the FTC with respect to documents numbered 1, 2, and 4. *In camera* inspection will be ordered pursuant to documents numbered 3, 5, 6, and 7.

This case stems from an FTC investigation of Americana Corporation. The investigation took place in or about April, 1973. The plaintiff first requested access to all records or documents pertaining to the investigation on June 20, 1978.[1] The Commission denied the plaintiff's request by letter dated July 22, 1978. The Commission claimed that exemption five of the FOIA, 5 U.S.C. § 552(b)(5), precluded disclosure of the documents. The plaintiff appealed this denial on August 3, 1978. On October 12, 1978, the General Counsel granted

---

[1] The plaintiff's original request also sought all records and documents pertaining to covert investigations directed at Grolier Corp. and its subsidiaries. It further sought all documents appurtenant to any covert investigation by the FTC. These requests, designated as categories B and C in the index of documents, have been withdrawn.

in part the plaintiff's appeal request.[2] Upon exhausting administrative remedies, Grolier filed the instant action on May 3, 1979.[3]

Discussion

This case presents the question whether seven documents withheld by the FTC properly fall within exemption five of the FOIA. 5 U.S.C. § 552(b)(5) states:

> (b) This section does not apply to matters that are—
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Exemption 5 "exempts those documents, and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). This exemption encompasses two categories: 1) the privilege for confidential intra-agency advisory opinion; and 2) the attorney-client and work-product privileges. *Id.*

The intra-agency advisory opinion privilege prohibits disclosure of memoranda and documents that reflect "intra-office advice on policy" and the "administrative reasoning process." It also exempts documents relied upon in determining a course of action. *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 945-46 (Ct.Cl. 1958). Disclosure of such documents would injure the consultative process within the government.[4] *Id.* at 946.

---

[2] The General Counsel granted the release of 122 documents in full. He also authorized the release of factual portions of other documents. The FTC withheld 102 documents in whole or in part based on exemption five of the FOIA.

[3] The FTC released additional documents on September 27, 28 and October 5, 1979.

[4] Memoranda falling within the advisory opinion category must be distinguished betwen documents that incorporate the delibera-

The attorney-client privilege protects a client's confidential communications with an attorney concerning professional advice. *Mead Data Cent., Inc.* v. *U.S. Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The work-product privilege encompasses the work-product rule of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). The rule applies to memoranda prepared in contemplation of litigation. This includes an attorney's mental impressions, conclusions, opinions, or legal theories pertaining to a particular litigation project. *Id.* at 511. Stated otherwise, exemption 5 subsumes the attorney work product privilege of Federal Rule of Civil Procedure 26(b)(3). *Mervin* v. *FTC*, 591 F.2d 821, 825 (D.C. Cir. 1978).

Herein, the FTC has provided a detailed *Vaughn* v. *Rosen* index with accompanying affidavits. The index identifies document number one as evaluating litigation strategies. It pertains to trial preparation materials and to certain interrogatory answers. Document number two is a draft of document number one.

There is litle question that these materials qualify as attorney work-product. This privilege, as explained above, protects from disclosure memoranda prepared in anticipation of litigation. Herein, the withheld portion of document number one [5] contains evaluations, opinions, and recommendations of the FTC pursuant to litigation preparation.

---

tive, policy-making process, and memoranda containing factual material. *EPA* v. *Mink*, 410 U.S. 86, 89 (1973). Purely factual material contained in a deliberative memorandum is severable and discoverable. *Id.* at 87-88. But in some circumstances "the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by § 552(b)(5)." *Mead Data Cent., Inc.* v. *U.S. Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977).

[5] The FTC withheld document number two in full. This document constitutes an intra-agency communication. It is predecisional in that the document is a draft of a final memorandum that evaluates litigation strategies.

Document number four is a letter from the Secretary of the FTC to the Acting Chief, Consumer Affairs Section of the Anti-Trust Division of the Justice Department. The letter addresses the FTC's "decision as to the method of handling litigation in *U.S.* v. *Americana.*" This document qualifies as an attorney-client communication. It involves an agency's communications (FTC) with its attorneys at the Justice Department. *See Mead Data, supra,* at 252 (agency communication with attorneys constitutes attorney-client contact exempted under 5 U.S.C. § 552(b)(5)).

Documents 3, 5, 6, and 7 are memoranda discussing instructions and procedures relating to the investigation of Americana Corporation. The FTC claims that the work product privilege justifies nondisclosure of these materials. According to the FTC: document number 3 discusses trial preparation; documents number 5 and 7 encompass attorney thought processes; and document number 6 contains evaluations, opinions, and recommendations of counsel.

The court questions whether these documents qualify as work product. That evaluations, opinions, recommendations and thought processes can constitute work product is beyond dispute. But the key to the work product privilege is whether the FTC prepared such documents "with an eye toward litigation", *Hickman* v. *Taylor, supra,* at 394, or "in anticipation of litigation or for trial." Federal Rule of Civil Procedure 26(b)(3). As stated by Professor Wright:

> Prudent parties anticipate litigation and begin preparation prior to the formal commencement of an action. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

C. Wright, *Law of Federal Courts*, § 82 at 408-09 (1976).

It is unclear from the *Vaughn* index whether the FTC prepared the documents at issue with an eye toward the Americana litigation. The court therefore orders the FTC to produce these documents for *in camera* inspection. The Supreme Court in *EPA* v. *Mink*, *supra* at 93, expressly approved of this procedure. It noted that "if it [the agency] fails to meet its burden without *in camera* inspection, the District Court may order such inspection.

An appropriate Judgment accompanies this Memorandum.

/s/ Thomas A. Flannery
United States District Judge

DATED: 2-21-79

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1215

GROLIER, INC., PLAINTIFF

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

[Filed Feb. 21, 1980]

JUDGMENT & ORDER

This matter came before the court on cross-motions for summary judgment. Upon review of the briefs submitted in this matter, the applicable law, and the record herein, it is, by the court, this 21st day of February, 1980,

ORDERED, ADJUDGED and DECREED that judgment be entered on behalf of the defendants with respect to documents number one, two and four; and it is further

ORDERED that the defendants submit documents number three, five, six and seven for *in camera* review before March 5.

/s/ Thomas A. Flannery
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 82-372

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

GROLIER INCORPORATED

ORDER ALLOWING CERTIORARI

Filed November 8, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 594520 1208